



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2010

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2010-19255

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 402417.

The Tarrant County District Attorney's Office (the "district attorney") received two requests for information from the same requestor for (1) the arrest history, charges, and convictions of two district attorneys and a district judge; (2) oaths of office as required by the Texas Constitution; (3) all reports filed pertaining to a specified citation; (4) bond information for the named district attorneys and district judge; (5) the badge numbers of the named district attorneys and district judge; (6) all e-mails of these individuals from July 28, 2010, to the date of the request; and (7) four categories of information pertaining to civil forfeitures.¹ You state the district attorney does not possess any information responsive to items (1), (4),

¹You state the district attorney sought and received clarification of the requests. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from the date request is clarified or narrowed).

and (5), and portions of item (7).² You state some information will be released to the requestor upon payment. You state portions of the submitted information are not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.106, 552.107, 552.108, 552.109, 552.111, 552.117, 552.1175, 552.119, 552.130, 552.136, 552.137, 552.147, and 552.151 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of submitted information, which we have marked, are not responsive to the instant requests as they were created outside of the date range specified in the requests or do not consist of e-mails of any of the named individuals. This ruling does not address the public availability of non-responsive information, and the district attorney is not required to release non-responsive information in response to these requests.

Next, you argue a portion of the submitted information is not subject to the Act because it consists of judicial records of a district judge that is maintained by the district attorney on behalf of the judiciary. A district judge is a member of the judiciary. The Act does not apply to the judiciary or judicial records. Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (stating that access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). Based on your representations and our review, we find the information we marked consists of records of the judiciary that are not subject to release under the Act. We therefore conclude you do not need to release the marked information in response to the present request.

You state a portion of the remaining information was obtained pursuant to a grand jury subpoena. As previously noted, the judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and, therefore, is not subject to the Act. *See Open Records Decision No. 411 (1984)*. Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See Open Records Decisions Nos. 513 (1988), 398 (1983)*. *But see ORD 513 at 4* (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983)*.

exclusion. See ORD 513. Thus, to the extent any portion of the remaining information is in the custody of the district attorney as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. This decision does not address the public availability of such information. However, to the extent this information is not in the custody of the district attorney as an agent for the grand jury, we will address your claimed exceptions to the disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You raise article 20.02(a) of the Code of Criminal Procedure, which provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). When construing article 20.02(a), the types of "proceedings" Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.); see also *Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating that anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). You have submitted no arguments explaining how the remaining information reveals grand jury testimony or the deliberations of the grand jury. Accordingly, you have failed to demonstrate the applicability of article 20.02(a) to the remaining information. Therefore, none of the remaining information may be withheld under section 552.101 on that basis.

We now turn to your claim under section 552.107 of the Government Code, as it is potentially the most encompassing exception you raise. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal

services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state some of the remaining e-mails and their attachments consist of communications between and among district attorneys and Tarrant County (the “county”) employees and representatives. You state the e-mails at issue pertain to legal advice either asked for or given to representatives of county departments; thus, these e-mails were made for the purpose of facilitating the rendition of legal services. You indicate the e-mails at issue were made in confidence and have remained confidential. Based on your representations and our review, we find the e-mails and attachments we marked consist of attorney-client privileged communications. In addition, we note some of the individual e-mails contained in the otherwise privileged e-mail strings consist of communications with non-privileged parties. To the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107. Further, some of the e-mails at issue were communicated with individuals you have not established are privileged parties or you have not demonstrated such e-mails are for the facilitation of the rendition of professional legal services. Therefore, we find you have failed to demonstrate these communications constitute privileged attorney-client communications; thus, the remaining information at issue may not be withheld under section 552.107. Accordingly, with the exception of the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the district attorney may withhold the e-mails and attachments we marked under section 552.107.

Next, you claim some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Furthermore, if a requestor seeks a governmental body's entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. *See* Open Records Decision No. 647 at 5 (1996) (*citing Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes); *see also Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case").

You cite to *Curry*; however, we find you have failed to demonstrate the requestor has sought any of the district attorney's entire prosecution files. Thus, *Curry* is not applicable in this instance. However, you also state some of the information at issue was created or prepared in connection with the prosecution of certain pending criminal cases by the prosecuting attorney or the attorney's representative. Upon review, we find you have demonstrated the work product privilege applies to some of the information at issue under section 552.111. However, we note other portions of the information at issue have been communicated with

individuals you have not established are privileged parties. Therefore, because these parties have had access to this information, the work product privilege under section 552.111 has been waived. Additionally, we find you have failed to demonstrate a portion of the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the district attorney may only withhold the information we marked under section 552.111.

We now turn to your arguments against release of portions of the remaining information. Section 552.101 of the Government Code also encompasses information made confidential by section 6103(a) of title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, we find the district attorney must withhold the tax return information we have marked pursuant to section 552.101 in conjunction with section 6103(a).

Section 552.101 of the Government Code also encompasses information protected by section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007 reads:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are

separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. Upon review, we find portions of the remaining information involve juvenile delinquent conduct. *See id.* § 51.03(a) (defining "delinquent conduct" for purposes of the Family Code). Thus, the district attorney must withhold the information we marked under section 552.101 in conjunction with section 58.007(c). We are unable to determine whether a portion of the remaining information pertains to an identified juvenile suspect or offender or if the individual identified is a victim. We have also marked this information. To the extent this marked information pertains to an identified juvenile suspect or offender, the district attorney must also withhold it under section 552.101 in conjunction with section 58.007(c). To the extent the identified individual is a victim, this marked information is not confidential pursuant to section 58.007(c), and the district attorney may not withhold it under section 552.101.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Portions of the remaining information, which we have marked, consist of information acquired from polygraph examinations subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the district attorney must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. *See* Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. Upon review, we find portions of the remaining information, which we marked, consist of CHRI that is confidential under chapter 411. Accordingly, the district attorney must withhold the information we marked under section 552.101 in conjunction with chapter 411 and federal law.

Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which governs the public availability of fingerprints. Section 560.003 of the Government Code provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* §§ 560.003; .001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .002 (governmental body may not sell, lease, or otherwise disclose individual's

biometric identifier to another person unless individual consents to disclosure). Thus, the district attorney must withhold the fingerprints we marked under section 552.101 in conjunction with section 560.003.

Next, you claim portions of the remaining information are confidential pursuant to the doctrine of common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office also has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* ORD 600 (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Furthermore, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See* Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system).

We note, however, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision No. 444 at 5-6 (1986)

(public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination).

Upon review, we find the information we marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the district attorney must withhold the information we marked under section 552.101 in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing or is of legitimate public interest. See generally *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a "legitimate public interest in facts tending to support an allegation of criminal activity" (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (1994))). Therefore, the district attorney may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You also assert portions of the remaining information are excepted from disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information at issue falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district attorney may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, the

informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

You raise the informer's privilege for the remaining information. However, you do not identify any individual in the information at issue who actually reported a violation of law. Further, you fail to inform this office of any specific criminal or civil statute that the district attorney believes to have been violated. We therefore conclude the district attorney has failed to demonstrate the applicability of the common-law informer's privilege to any of the remaining information. Thus, the district attorney may not withhold any of the remaining information under section 552.101 in conjunction with the informer's privilege.

You also claim portions of the remaining information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a). The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

You assert portions of the remaining information are excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the

exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state prior to the receipt of the instant request for information, the district attorney initiated a civil forfeiture case pursuant to Chapter 59 of the Texas Code of Criminal Procedure involving certain named individuals. Thus, we agree litigation was pending at the time the district attorney received the instant request. Further, we find a portion of the information at issue, which we marked, relates to this pending litigation. However, you have failed to demonstrate how any portion of the remaining information is related to this or any other pending litigation. Therefore, none of the remaining information may be withheld under section 552.103.

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district attorney may only withhold the marked information that the opposing party to the litigation has not seen or had access to under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument under section 552.106 of the Government Code. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). We note section 552.106(b) applies to information created or used by employees of the governor’s office for the purpose of evaluating proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances).

In this instance, you generally assert some of the remaining information is excepted from disclosure under section 552.106. However, you have not indicated which information

constitutes a draft or working paper involved in the preparation of proposed legislation. Further, you have not indicated which information constitutes an internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation. Therefore, we conclude the district attorney may not withhold any of the remaining information under section 552.106.

Next, you seek to withhold portions of the remaining information under section 552.108(a) of the Government Code, which provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). As a general rule, the protections afforded by subsections 552.108(a)(1) and 552.108(a)(2) are mutually exclusive. Section 552.108(a)(1) is applicable to information pertaining to a pending criminal investigation or prosecution, while section 552.108(a)(2) protects law enforcement records pertaining to a criminal investigation or prosecution that concluded in a final result other than a conviction or a deferred adjudication. A governmental body that claims section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A) (governmental body must submit written comments stating what claimed exception applies that would allow information to be withheld). A governmental body that claims section 552.108(a)(1) must demonstrate that release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.108(a)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims section 552.108(a)(2) must demonstrate that the information at issue is related to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2).

You raise subsection 552.108(a)(1) and subsection 552.108(a)(2) for portions of the remaining information. However, you do not indicate which portions pertain to pending criminal investigations or prosecutions and which portions pertain to closed investigations that did not result in convictions or deferred adjudications. Thus, we find you have not sufficiently demonstrated any of the remaining information falls within the scope of subsection 552.108(a)(1) or subsection 552.108(a)(2). We therefore conclude the district attorney may not withhold any of the remaining information under section 552.108.

We now turn to your argument under section 552.109 of the Government Code for portions of the remaining information. Section 552.109 excepts from public disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” *Id.* § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See* 540 S.W.2d 668 (Tex. 1976). Although you raise section 552.109 for portions of the remaining information, we find you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing. Thus, none of the remaining information may be withheld under section 552.109.

Next, you raise section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked personal information of district attorney employees. You do not inform us these employees requested confidentiality pursuant to section 552.024. Accordingly, if these individuals timely elected confidentiality, the district attorney must withhold the information we have marked under section 552.117(a)(1). However, if any of the cellular telephone numbers we have marked under section 552.117(a)(1) are from a cellular telephone service paid for by the district attorney, then those telephone numbers must be released. If the employees did not timely elect confidentiality for the marked information, none of their information may be withheld under section 552.117(a)(1).

You also raise section 552.1175 of the Government Code, which applies to information pertaining to peace officers that the district attorney does not hold in an employment context. Section 552.1175 provides in part:

- (a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We note section 552.1175 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6. We have marked pager and cellular telephone numbers of individuals who appear to be peace officers, as well as an individual's address. The district attorney must withhold this information under section 552.1175 if the individuals to whom the information pertains are still licensed peace officers and they elect to restrict access to their information in accordance with section 552.1175(b); however, the district attorney may only withhold the pager and cellular telephone numbers we marked if the pager and cellular telephone services are not paid for with government funds. If the individuals are no longer licensed peace officers or no election is made, the district attorney may not withhold the individuals' information under section 552.1175.

You also raise section 552.119 of the Government Code, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. By its terms, section 552.119 only applies to photographs of licensed peace officers as defined by article 2.12. *Id.* § 552.119(a). Further, to demonstrate the applicability of section 552.119, a governmental body must demonstrate that release of the photograph would endanger the life or physical safety of a police officer. In this instance, you have not explained how release of any of the remaining information would endanger an officer's life or physical safety. Accordingly, we find you have failed to demonstrate the applicability of section 552.119 to any of the remaining information.

You also raise section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. *Id.* § 552.130(a)(1), (2). The district attorney must withhold the Texas motor vehicle record information we have marked in the remaining information under section 552.130.

Next, we address your claim under section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). This office has determined insurance policy numbers are "access device" numbers for purposes of section 552.136. Therefore, the district attorney must withhold the information we have marked under section 552.136.

Next, you raise section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. We note one of the e-mail addresses at issue belongs to the requestor. Therefore, pursuant to section 552.137(b), the district attorney may not withhold the requestor's e-mail address under section 552.137(a). *See id.* § 552.137(b). Accordingly, the district attorney must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners affirmatively consent to the public disclosure of their e-mail addresses.

Section 552.147 of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See id.* § 552.147(b). Thus, we agree the district attorney may withhold the social security numbers within the remaining information under section 552.147.

Lastly, you also raise section 552.151 of the Government Code. Section 552.151 provides in part the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.151. You state the district attorney prosecuted the requestor's family and is currently suing the requestor in a related civil seizure and forfeiture case. Thus, you state you believe any information that identifies the exact date, time, and location of the first named district attorney may jeopardize his safety. However, we find you have failed to demonstrate how release of any of the remaining information would actually subject this named district attorney to a substantial threat of physical harm. Accordingly, the district attorney may not withhold any of the remaining information under section 552.151.

We note portions of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the information we marked is not subject to the Act and the district attorney need not release it. The district attorney may withhold the information we have marked under section 552.107 of the Government Code; however, the district attorney may only withhold the non-privileged e-mails we have marked within the otherwise privileged e-mail strings if the non-privileged e-mails do not exist separate and apart from the e-mail strings. The district attorney also may withhold the information we have marked under section 552.111 of the Government Code. The district attorney must withhold the tax information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The district attorney must withhold the information we marked under section 552.101 of the Government Code in conjunction with

section 58.007(c) of the Family Code; however, the district attorney must only withhold some of this information, which we have indicated, if the identified individual is a suspect or offender. The district attorney also must withhold the information we marked under section 552.101 of the Government Code in conjunction with (1) section 1703.306 of the Occupations Code, (2) chapter 411 of the Government Code and federal law, (3) section 560.003 of the Government Code, and (4) common-law privacy. The district attorney must withhold the dates of birth we marked under section 552.102(a) of the Government Code. The district attorney may withhold the information we marked under section 552.103 of the Government Code. If the district attorney employees whose personal information we marked elected to keep the marked information confidential, the marked information must be withheld under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may only be withheld if the cellular telephone service is not paid for by the district attorney. The district attorney must withhold the pager numbers, cellular telephone numbers, and address we marked under section 552.1175 of the Government Code if the individuals to whom this information pertains are still licensed peace officers and they elect to restrict access to their information; however, the district attorney may only withhold the pager and cellular telephone numbers we marked if the pager and cellular telephone services are not paid for with government funds. The district attorney must withhold (1) the Texas motor vehicle record information we marked under section 552.130 of the Government Code, (2) the information we marked under section 552.136 of the Government Code, and (3) the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.³ The district attorney may withhold social security numbers pursuant to section 552.147 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.

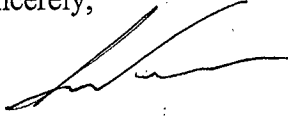
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: Texas driver's license and license plate numbers under section 552.130 of the Government Code; credit card, routing, checking account, and insurance policy numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 402417

Enc. Submitted documents

c: Requestor
(w/o enclosures)